United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING

76-1487

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1487

UNITED STATES OF AMERICA,

Appellee,

-against-

WALLACE JARVIS,

Appellant.

PETITION FOR REHEARING

DAVID G. TRAGER,
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Eastern District of New York.

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UNITED STATES COURT OF APPEALS
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PETITION FOR REHEARING

On January 26, 1977, a panel of this Court affirmed the judgment of conviction of the appellant Wallace Jarvis. Although it accepted appellant's claim that his arrest without a warrant inside a dwelling was invalid, it concluded that there was no evidence which was seized which could be characterized as the "fruit" of the illegal arrest.

We petition for reconsideration, despite the affirmance of the judgment of conviction, because we believe that the dictum in the opinion, that a daylight arrest without a warrant inside a dwelling must ordinarily be made with a warrant, is inconsistent with clear prior holdings of this Court, which regrettably were not cited in our brief. United States v. Fernandez, 480 F.2d 726, 740, n. 20 (C.A. 2, 1973); United States v. Gonzalez, 483 F.2d 223, 225, n. 2 (C.A. 2, 1973). Moreover, we also believe that there are substantial arguments, which were not considered,

against the adoption of the particular rule sanctioned by the panel.

1. In United States v. Fernandez, supra, 480 F.2d at 740, n. 20, this Court held that:

> "Even if the arrest warrant was therefore invalid, none is required for a day-time arrest, even in a dwelling, which has been made on probable cause, especially when, as here, no force was used. United States v. Hall, 348 F.2d 837, 841 (2 Cir. 1965). Contrast Jones v. United States, 357 U.S. 493, 499-500, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958); Coolidge v. New Hampshire, 403 U.S. 443, 474 (Stewart, J.), 492 (Harlan, J.), 91 S.Ct. 2022, 29 L.Ed. 564 (1971), with respect to a 'forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought.'"

Accord: United States v. Gonzalez, supra, 483 F.2d at 225, n. 2 (C.A. 2, 1973).

In holding as it did in United States v. Fernandez, supra, the Court relied upon an earlier opinion of Judge Friendly in United States v. Hall, 348 F.2d 837, 841-842 (C.A. 2, 1965), certiorari denied, 382 U.S. 947 (1965). There Judge Friendly explained the reason for the distinction between the necessity for search warrants and arrest warrants:

> "The Fourth Amendment must be construed in the light of its common-law background. Whereas search warrants were required save in exceptional cases, 'all felony arrests, including those involving entry into houses, could be made without securing warrants. In fact, warrants were regarded with suspicion and their use recognized only reluctantly and for the primary purpose of

> protecting persons making arrests from tort liability.' Barrett, Personal Rights, Property Rights and the Fourth Amendment, 1960 Supreme Court Review 46, 49-50, citing, inter alia, 1 Chitty, Criminal Law 15-26, 33, 51-59 (1816). The reason underlying the distinction may be that a person, save possibly when asleep at home during the night, always has the same potential mobility as do objects which are in a moving vehicle or, because of their small size, and the proximity of someone with adequate motive, are in danger of being removed or destroyed, and are thus subject to search and seizure on probable cause without a search warrant. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 548 (1925); Johnson v. United States, 333 U.S. 10, 14-15, 68 S.Ct. 367, 92 L.Ed. 436 (1948); Ker v. California, 374 U.S. 23, 42 n. 13, 83 S.Ct. 1623, 10 L.Ed. 726 (1963)."

We respectfully submit that a panel of this Court should not enunciate a rule inconsistent with these clear holdings without en banc consideration of the question. United States v. Alessi, 544 F.2d 1139, 1152 (C.A. 2, 1976). Of course, since the conviction must be affirmed without regard to the validity of the arrest, this would hardly be an appropriate case in which to invoke that extraordinary procedure.

And, indeed, for the very same reason, even if the panel were writing on a clean slate, it would not be appropriate for a three judge panel of this Court, only one of whose numbers is an active judge of the Second Circuit, to resolve an important issue of law involving the validity of warrantless arrests in a case in which nothing turns on the validity of the arrest. As the Supreme Court has observed: "[C]onstitutional adjudications

[should] not stand as mere dictum." Stovall v. Denno, 388 U.S. 293, 301 (1967).*

2. These important principles of sound appellate adjudication aside, there are substantial arguments to be made against the rule reflected in the dictum of the panel. We annex hereto a copy of the brief filed by the Solicitor General in United States v. Santana, ___U.S.___(1976), which, at pp. 30-49, contains a thorough discussion of these arguments. In particular, we respectfully direct the attention of the panel to the discussion of the problems inherent in the Dorman approach, based as it is on "balancing" a number of relevant factors (Br. 47-49). The approach provides little in the way of meaningful guidance to law enforcement officers who have to follow it. Moreover, if a departure is to be made from the traditional common law rule, which this Court followed in Hall and Fernandez, it should be limited to requiring a warrant in certain specific cases. As the Solicitor General observed (Br. 47):

> "Th[is] *** sort of rule, which we believe would be the more sound approach, would state that warrants are necessary in carefully defined situations. Jones expressed concern about forcible nighttime entries; a rule responding to this concern

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* Moreover, an opinion resolving an issue adversely to the United States, but deciding the case in its favor, makes it impossible for the United States to seek further appellate review of the issue before it is followed by the judges of the district courts of the Second Circuit.

> would require warrants for such entries, which by their nature are more intrusive than daytime entries. This rule would be similar to the rule suggested by the American Law Institute. (Indeed, it might well be regarded as unreasonable to make a nighttime entry, warrant or no warrant, when a daytime entry would have served as well.) Similarly, because entries to make arrests for crimes long completed are more likely to be mistaken, and are more open to abuse, than are entries to arrest individuals for freshly committed or ongoing crimes, the Court might hold that warrants ordinarily should be obtained to make arrests for crimes completed more than a few hours prior to the arrest. See our argument at pages 25-29, supra. The rules requiring warrants in such cases would, of course, be subject to the traditional exceptions for exigent circumstances or consent."

Surely, the resolution of this complex issue should be left to an opinion in which it is necessary to the outcome of the case. But, if the panel feels that the issue must be reached here, we respectfully ask that due consideration be given to these substantial countervailing arguments. Although they were not fully explicated in our brief, this should not preclude reconsideration of an issue that has ramifications far beyond the facts of this case.

CONCLUSION

The petition for rehearing should be granted and the dictum on the validity of appellant's arrest should be reconsidered.

Dated: August 9, 1977.

Respectfully submitted,

DAVID G. TRAGER
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Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant U. S. Attorney,
(Of Counsel)

We demonstrate in Part I of the argument that follows that an arrest for a felony is constitutional if the arrest is supported by probable cause. In Part II we discuss the effect of the fact that the arrest took place within Santana's residence and demonstrate that such an entry was reasonable under the circumstances of this case. The seizure of the marked money and heroin—incident to a lawful arrest—was therefore proper, and these items are admissible at trial against respondents.

I. NO WARRANT IS NECESSARY TO MAKE A PROBABLE CAUSE ARREST OF A PERSON STANDING IN PLAIN VIEW IN THE DOORWAY OF HER RESIDENCE

A. PROBABLE CAUSE SATISFIES THE FOURTH AMENDMENT'S REQUIREMENT OF REASONABLENESS

This Court has held, without deviation, that probable cause is sufficient to support a felony arrest with or without a warrant. We have argued in *United States* v. *Watson*, No. 74–538, certiorari granted, 420 U.S. 924, that there is no reason to depart from this rule.[5] We rely here upon the arguments made in our brief in *Watson*.

At common law in England, and today in all 50 States, the law has permitted felony arrests to be made upon probable cause or its equivalent, whether or not there was sufficient time to obtain a warrant. This Court too has concluded that a warrantless felony arrest is reasonable within the meaning of the Fourth Amendment if it is supported by probable cause. It

[5] Copies of our brief in *Watson* have been sent to counsel for respondents.

stated in *Carroll* v. *United States*, 267 U.S. 132, 156–157:

> * * * [A] police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and * * * he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence.

Since *Carroll* this Court repeatedly has upheld warrantless arrests on probable cause. One of those cases, *Henry* v. *United States*, 361 U.S. 98, involved 18 U.S.C. 3052, a statute authorizing agents of the Federal Bureau of Investigation to make warrantless arrests. The Court, speaking through Mr. Justice Douglas, held that the statute "states the constitutional standard" (361 U.S. at 100). And in *Gerstein* v. *Pugh*, 420 U.S. 103, 111–116, the Court observed that probable cause arrests never have been invalidated solely because officers failed to obtain a warrant and implied in the plainest terms that the issue of warrantless arrest remains unsettled only to the extent that the arrest takes place within a residence or other private place.

We submit that, in light of the constitutional history and applicable precedents, developed more fully at pages 14–26 of our brief in *Watson*, there could be no question concerning the constitutionality of respondents' arrests, if the arrests had occurred in a public place. Indeed, if the arrests had occurred in a public place, the argument for their constitutionality would be even stronger than that in *Watson*. In the present case, the arresting officers had "strong probable cause" (Pet. App. 2a) to believe that only

moments before the arrest Santana had sold heroin to McCafferty. McCafferty had identified Santana as the prospective source, had entered Santana's residence and, after emerging, producing heroin, and being arrested, had stated that Santana had the purchase money. The officers had probable cause to believe that Santana had supplied the heroin, was in possession of the purchase money, and was likely to be in possession of still more heroin. Moreover, although there was an opportunity to obtain a warrant for Watson's arrest, there was no comparable opportunity here unless the officers were willing to tolerate the considerable risk that Santana or Alejandro would learn of McCafferty's arrest and, upon so learning, flee (or dispose of, secrete or destroy the heroin and money they were known to possess).[6] So, too, the officers had reason to believe that Santana was committing the continuing offense of possession of heroin with intent to distribute; an immediate arrest would terminate the offense as it was being committed. *Trupiano* v. *United States*, 334 U.S. 699, 704–705; *United States* v. *Weaklem*, 517 F. 2d 70 (C.A. 9). Therefore, even if the Court decided that a warrant was required

[6] Respondents argued in the district court that Officer Gilletti had probable cause to arrest Santana in advance of the transaction on August 16, and that the officers should have obtained a warrant during this interval. The evidence, which we have recounted at note 1, *supra*, does not support this theory.

Even if Officer Gilletti could have obtained a warrant for Santana's arrest in advance of the transaction with McCafferty, this fact would be immaterial, for the reasons we have discussed at pages 19–26 of our brief in *Watson*. What is more, the transaction between Santana and McCafferty furnished the officers with fresh

for Watson's arrest, no warrant would be required for Santana's arrest.[7]

The argument to this point has analogized the arrest of Santana to an arrest of a person observed in a public place. We now discuss the possibility that a person standing in plain view in the doorway of a residence should be treated differently.

B. THE ARREST OF A PERSON STANDING IN AN OPEN DOORWAY IS SUBJECT TO THE SAME RULES AS THE ARREST OF A PERSON IN A PUBLIC PLACE, BECAUSE THE EXPECTATIONS OF PRIVACY ARE SIMILAR

When the arresting officers arrived at Santana's residence, Santana was standing in the open doorway of her residence with a brown paper bag in her hand. She was in the plain view of the officers and of anyone else who passed by on the street. Although Santana was not in a public place, we submit that by standing in public view Santana abandoned most of the privacy to which she would have been entitled in

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probable cause to arrest Santana for a recently committed offense. There was no opporunity for the officers to obtain a warrant with respect to the offense for which respondents were arrested, and the arrests would consequently be proper even if the officers were required to obtain a warrant to arrest Santana for an offense committed on some previous occasion. The court that decided *Watson* has limited it to cases in which there was a substantial delay between the acquisition of probable cause and the arrest. See *United States* v. *Weaklem*, 517 F. 2d 70, 72 (C.A. 9). Cf. our brief in *Watson* at pages 19–20, n. 10.

[7] It follows that it was proper to arrest respondent Alejandro, who scooped up two packets of heroin and attempted to flee (App. 53).

the interior of her home, and that the officers could approach her for the purpose of arresting her, just as if she had been in a public place.

The officers' observation of Santana, and their approach to her for the purpose of arresting her, are perhaps most closely analogous to the "plain view" doctrine that supports the seizure of objects. Santana was seen in plain view by officers who had a right to be upon the public streets. "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure * * *" (*Harris* v. *United States,* 390 U.S. 234, 236). Santana abandoned her claim to personal privacy by willingly exposing herself to public observation. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection" (*Katz* v. *United States,* 389 U.S. 347, 351).

The officers did not intrude upon Santana's property to make their observation of her. But even if they had not observed her until they were approaching her front door, their observations and approach would have been reasonable within the meaning of the Fourth Amendment. In *Air Pollution Variance Board of Colorado* v. *Western Alfalfa Corp.,* 416 U.S. 861, the Court upheld an inspector's entry into the property of the corporation for the purpose of making observations, where the observations occurred at a place from which the public was not excluded. The public ordinarily is not excluded from the areas immediately adjacent to houses. Indeed, the driveway and front

walkway of houses are usually thought of as means of access, to be used by all who arrive. Therefore, even if Santana had not been in plain view, it would have been permissible for the officers to approach Santana's residence, to ring the bell, and to inquire whether Santana was within.[8] If that is so, then there can be no reasonable question concerning the power of the officers to approach someone standing in plain view in the doorway of her residence.[9]

II. A WARRANT IS NOT REQUIRED TO EFFECT THE PROBABLE CAUSE ARREST OF A PERSON WHO, UPON BEING CONFRONTED BY ARRESTING OFFICERS, RETREATS INTO HER RESIDENCE

We have argued that the officers were entitled to approach Santana in the doorway of her home and to arrest her there. As the officers approached her, with guns and at least one identification card displayed

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[8] Cf. *United States* v. *Magana*, 512 F. 2d 1169 (C.A. 9), certiorari denied, October 6, 1975, No. 74–1361. Federal agents drove a van onto the driveway of a private residence and arrested the occupant, who was standing in plain view between the house and the garage. The occupant contended that the entry upon the driveway was improper and that, because he could not have been seen from the street, his arrest was consequently improper. The court of appeals rejected this argument, relying upon *Katz*; it held that law enforcement officers, no less than private citizens, are entitled to use driveways and walkways that give access to a house. See also *United States* v. *Capps*, 435 F. 2d 637 (C.A. 9); *United States* v. *Langley*, 466 F. 2d 27 (C.A. 6).

[9] Cf. *Ponce* v. *Craven*, 409 F. 2d 621, 624–625 (C.A. 9), certiorari denied, 397 U.S. 1012 (officers standing in a parking lot see and hear occupants of motel room committing a crime; warrantless entry to make arrest upheld); *Gil* v. *Beto*, 440 F. 2d 666 (C.A. 5); *Taylor* v. *Arizona*, 471 F.2d 848 (C.A. 9), certiorari denied, 409 U.S. 1130.

(see page 4, *supra*), she retreated from the doorway into the vestibule. There was but a slight distance from the curb to Santana's door, however, and an officer overtook her before she retreated further from the vestibule into the living room of her residence. We submit that the arrest was not the less reasonable because it took place in the vestibule rather than on the doorstep. An individual is not entitled to seek "sanctuary" in her home as the police approach to effect a lawful arrest.

We discuss, in turn, two alternative arguments that support this result. We contend, first, that even if a search or arrest warrant ordinarily is required before officers can enter a residence to make an arrest, that requirement does not apply when the officers follow an individual into her home in fresh pursuit soon after a crime has been committed. Alternatively, if this case is not considered suitable for analysis under an analogue to the fresh pursuit rationale, we argue that the arrest still must be upheld because warrants are not generally required to make probable cause arrests even within an offender's residence. Finally, we argue that even if the officers should have obtained a warrant in this case, the evidence should be admitted because it was a fruit of the arrest rather than a fruit of the entry or of any search of the premises.

A. OFFICERS ARE ENTITLED TO ENTER A RESIDENCE IN PURSUIT OF A SUSPECT DISCOVERED ONLY MINUTES AFTER THE COMMISSION OF A CRIME

Assuming *arguendo* that officers ordinarily should acquire a warrant before entering a private residence

in search of someone they have probable cause to arrest, it does not follow that the entry into Santana's vestibule to arrest her was unconstitutional. Indeed, the very statement of the constitutional right suggested by the plurality opinion in *Coolidge* v. *New Hampshire,* 403 U.S. 443, 480, demonstrates its inapplicability to cases of the present sort. The officers did not enter Santana's residence *in search of her;* they simply followed her through the open door. No "search" for her was necessary, and none was conducted.

1. In the district court and the court of appeals the government analogized the officers' conduct to the "hot pursuit" entry approved in *Warden* v. *Hayden,* 387 U.S. 294, 297–299. The district court rejected this analogy, stating that the "hot pursuit" rationale applies only to the "usual kind of a chase in and about public streets or places or even in and about a building" (Pet. App. 5a). Because in its view this case involved no "chase" that "ended up into [*sic*] the house" (*ibid.*), the court concluded that there had been no "hot pursuit."

We agree with the district court that the expression "hot pursuit" seems to imply some sort of "chase." To the extent that a "chase" or "pursuit" is a necessary ingredient of the doctrine, however, we submit that it was present here. The officers had seen Santana from a public place and properly approached her in order to arrest her. When Santana retreated, the officers followed her in close pursuit. The "hot pursuit" doctrine reasonably requires no more in the way of a

"chase" than action by officers to follow an individual fleeing from the outside of a private place into the inside. Cf. *Commonwealth* v. *Hughes*, 219 Pa. Super. 181, 280 A. 2d 556, in which the Pennsylvania court approved a warrantless arrest entry when a suspect, discovered in the hallway of an apartment building, retreated into one of the rooms.[10]

In short, even under the most narrow reasonable understanding of the traditional "hot pursuit" doctrine, Santana's arrest was lawful. We believe that the Court need go no further. We present the arguments that follow, however, out of an abundance of caution, aware that the Court on several occasions has expressed concern about warrantless entries to make arrests.[11]

[10] The approval by Pennsylvania courts of an arrest similar to that of respondent Santana is significant because, if an arrest by state officers passes muster under state law, only federal constitutional issues remain. *Miller* v. *United States*, 357 U.S. 301, 305–306. We would argue in an appropriate case that evidence seized as a result of an arrest meeting all constitutional standards can be introduced in a federal prosecution without regard to the legality of the arrest under state law. Cf. *Elkins* v. *United States*, 364 U.S. 206, 223–224; Fed. R. Evid. 402. Since the arrest in this case was lawful under state law, however, it is unnecessary for the Court to consider that argument in this case.

[11] We present them, too, to inform the Court of our position in light of the brief filed by the Americans for Effective Law Enforcement and the National District Attorney's Association. *Amici* assume (perhaps relying upon the "negative inference" from *Warden* v. ~~Hayden~~, *supra*; see note 20, *infra*) that a warrant ordinarily is necessary to make an arrest entry and that this case therefore requires an explication of the "exigent circumstances" doctrine. As our argument indicates, we believe that arrest entries can be made in many cases whether or not the circumstances are "exigent" in the sense that they would justify an entry for purposes of a search.

2. Although we believe that there was "pursuit" in this case, we submit that, correctly understood, the "hot pursuit" doctrine does not require such direct pursuit. In fact, "hot pursuit" has been used in two senses, both by this Court and in the common law. The first sense, on which we rely in the preceding argument, has involved an actual chase. Courts have held that, when officers chase a suspect into a building, the officers can follow without observing the ordinary requirement (codified at 18 U.S.C. 3109) that they announce their authority and purpose. See Wilgus, *Arrest Without A Warrant,* 22 Mich. L. Rev. 541, 798, 804 (1924). "Where such circumstances as an escape and hot pursuit by the arresting officer leave no doubt that the fleeing felon is aware of the officer's presence and purpose, pausing at the threshold to make the ordinary requisite announcement and demand would be a superfluous act which the law does not require." *Ker* v. *California,* 374 U.S. 23, 55 (Brennan, J., dissenting in part). In such cases the chase is the essence of the rule, for it is the chase itself that puts the suspect on notice of the officers' authority and purpose and therefore excuses pausing at the threshold to give notice of authority and make demand to enter. The physical fact that there has been a chase serves to dispose with a prerequisite to forcible entry that must otherwise be observed.

"Hot pursuit" was used in quite another sense in *Warden* v. *Hayden, supra,* for in that case the "hot pursuit" supplied the reason to enter a house in search of a suspect. In *Hayden* officers who had not per-

sonally witnessed a robbery were informed by a taxi driver that a man resembling the robbery suspect had entered a certain residence. The officers promptly entered the residence and fanned out throughout the house. One officer arrested the suspect; another officer, searching the inside of a toilet tank, came upon a gun that had been used in the robbery; still a third, searching through a washing machine in the basement, found clothing that the robber had worn. The Court upheld not only the entry into the house and the arrest but also the thorough search. It concluded that the officers were not required to delay in the course of their investigation to obtain a warrant, where that delay might have allowed the suspect to escape, to endanger others, or to destroy evidence. The Court recognized that some things are evanescent; even though the suspect was apprehended in his own home, he might not have remained there, or he might have succeeded in destroying the evidence. The officers could have surrounded the house and sought a warrant, but the Court did not require them to do so.

There was no "chase" in *Hayden*. The suspect was inside his home when the officers learned of his whereabouts. Nor has there been a "chase" in other recent cases applying the "hot pursuit" doctrine. For example, in *United States* v. *Holland*, 511 F. 2d 38 (C.A. 6), certiorari denied, 421 U.S. 1001, the officers apprehended the suspect approximately an hour after the crime as a result of detective work and leads compiled by visiting several addresses to which the suspect might have repaired; there was no chase. In *United States* v. *Scott*, 520 F. 2d 697 (C.A. 9), the officers

apprehended their suspect nearly two hours after the crime, having tracked down the car that the suspect apparently had used and found his location by patiently ascertaining where he had *not* gone; there was no chase. Cf. *United States* v. *Monteill,* C.A. 2, No. 75–1274, decided November 26, 1975. Whether or not cases like these use the term "hot pursuit," they share a common feature: the officers are acting as part of a chain of events leading, with only brief interruptions, from the crime directly to the arrest.

We submit that these cases are correctly decided. Even if there ought to be a requirement of a warrant, in ordinary circumstances, before officers can enter a house to search for a suspect, these cases correctly create an exception for entries in the course of a reasonably prompt investigation during the hours immediately after the crime. The exception is supported by the certainty that some opportunities will be lost forever if not capitalized upon at once. During the first few hours after the crime the culprit is likely to be in possession of the instrumentalities and fruits of the crime; he may dispose of these as time passes. During the first few hours after the crime an arrest of the culprit is most likely to yield evidence (whether clothing, as in *Warden* v. *Hayden, supra;* or fingernail scrapings, as in *Cupp* v. *Murphy,* 412 U.S. 291; or something else) that may disappear if given the chance to do so. Once substantial time has elapsed after the crime, it may make some sense to presume that whatever is going to disappear, has disappeared, and, upon that presumption, to conclude that the few hours of additional delay necessary to procure a war-

rant will not unnecessarily jeopardize the investigation or further diminish the chances of capture. But during the first few hours time is of the essence; it is often impossible to tell, in any individual case, what evidence will disappear, or whether the suspect will try to escape. And, in consequence, it is reasonable for law enforcement officers to be free to move quickly in all cases, before the feared events can come to pass.

At the same time, an entry to make an arrest during the time shortly after the crime has been committed poses few of the dangers that might ordinarily be thought to accompany warrantless entries in search of suspects. Almost by definition, the entry soon after the crime will not be a pretextual entry—an entry purportedly to arrest but actually to search the premises. By defining the requisites of entry in such a way that it is part of the reasonably continuous flow of events after the crime, it is possible to ensure that the officers are not staging their arrest at a time most likely to enable them to search.[12] Similarly, because the officers are acting upon information and facts that may be only a few minutes old, there is little likelihood that premises will be entered on the basis of faulty memories, or to search for evidence of crimes that may (or may not) have occurred long ago.

It could be argued in opposition that, although this is true in the run of cases, the exigencies calling

[12] And, of course, the problem of pretextual arrests has been significantly alleviated by *Chimel* v. *California*, 395 U.S. 752, which held that a search incident to arrest is confined to the immediate whereabouts of the person arrested.

for a warrantless entry to make an arrest do not apply in some other cases. In the instant case, for example, the district court concluded that the arresting officers had no proof that respondents would have fled or destroyed evidence if they had delayed their investigation to obtain a warrant. And that may well be true. But the justification supporting expeditious action after a crime has been committed ought not to turn upon the question whether, in a particular case, flight appeared to be or was imminent or evidence was soon to be destroyed. The entry to make a warrantless arrest is reasonable within the meaning of the Fourth Amendment because it is reasonable to suppose that in many instances within this class of cases flight will occur or evidence will be destroyed. To require the officers to deduce, on the spur of the moment, whether the felon they are then and there apprehending is likely to flee or to destroy or secrete evidence if given the opportunity, is to require the impossible. It should be enough that flight and destruction of evidence occur soon after a crime in many cases.

We submit that the Court should hold here, as it held in *United States* v. *Robinson*, 414 U.S. 218, that the nature of the justification for the official conduct is such that the conduct is reasonable as applied to all cases arguably within the scope of that justification, whether or not the officers can point to particular factors that would make their actions imperative in the particular case. See generally LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures"*

dures": *The Robinson Dilemma,* 1974 Sup. Ct. Rev. 127. "A highly sophisticated set of rules, qualified by all sorts of ifs, and, and buts * * * may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.' If the rules are impossible of application by the police, the result may be the sustaining of motions to suppress on Fourth Amendment grounds with some regularity, but this can hardly be taken as proof that 'the people' are 'secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' Rather, that security can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement" (*id.* at 141–142; footnotes omitted).[13]

There will, of course, be many occasions for which categorical rules will be inappropriate and on which

[13] Professor LaFave suggests that, whenever possible, the courts should attempt to establish generalized rules applicable to categories of cases—rules capable of statement in such a way that proper police conduct can be ascertained beforehand, without the need for sophisticated on-the-spot balancing of many competing factors. He contends that there are many sorts of case in which the "balancing" necessary to determine whether the official conduct is "reasonable" can be accomplished by the judiciary and incorporated into rules capable of mechanical application. The rule that arrest entries may be made without a warrant during the hours immediately after a crime has been committed is such a rule and, we contend, is justified by the balance of considerations applying to such cases as a class.

individualized determinations of the reasonableness of official conduct will be necessary. We do not advocate the abolition of case-by-case inquiries when circumstances call for them. But rules of general applicability sometimes are feasible and, when they are, can reduce the need for individualized determinations. Cases involving arrests reasonably promptly after a crime are, we submit, appropriately dealt with by a categorical rule arrived at by prior balancing of the interests involved.

The instant case fits comfortably within the class of cases that would be addressed by such a categorical rule. The officers acted promptly after a crime had occurred. They apprehended one of the perpetrators of that crime and were able to preserve critical evidence. Their actions averted any possibility of flight or disappearance of evidence that might have occurred if respondents had found out about the arrest of McCafferty. See *United States* v. *Mapp*, 476 F. 2d 67, 74 (C.A. 2).[14] Furthermore, the prompt arrest terminated the crime of heroin possession then being

[14] "Mapp, who had just been arrested, was entitled to make one telephone call, a call he might have placed to Mrs. Walters, warning her of the imminent danger of arrest. * * * It was also possible that Mapp planned to return to Mrs. Walter's apartment within a few hours; his failure to return, as a result of the arrest, might have alerted Mrs. Walters to possible danger, resulting in the destruction of evidence."

committed by Santana and foreclosed the possibility that she would be able to accomplish further criminal distributions of the substance.

B. A WARRANT ORDINARILY IS NOT REQUIRED TO ENTER A PRIVATE PLACE IN ORDER TO SEARCH FOR SOMEONE WHOM THERE IS PROBABLE CAUSE TO ARREST

The police officer's decision to arrest brings into conflict two basic social interests: the interest in apprehending those guilty of crime, and the inconsistent interest of the individual in the privacy of his own person. We discussed in our brief in *Watson* the manner in which these competing interests have been accommodated. Excluding brief investigative stops of the kind considered in *Terry v. Ohio,* 392 U.S. 1, and like cases, the individual's interest gives way only if the officer possesses probable cause, and the existence of probable cause may properly be put to the test by a judicial hearing shortly after the arrest rather than by an *ex parte* warrant application prior to it. This accommodation gives a substantial measure of protection to the interest of the individual, while recognizing that investigations could be frustrated by a requirement of antecedent judicial approval of arrests. See *Gerstein* v. *Pugh,* 420 U.S. 103, 111–116.

An additional interest is involved when the officers must enter a private place to search for the person

to be arrested. An arrest entry implicates not only the individual's interest in the privacy of his person, but also his interest (and possibly that of other occupants of the place) in the privacy of his surroundings. Law enforcement officers ordinarily cannot enter a private place to *search* for things until they have received the prior approval of a neutral and detached magistrate; this rule applies even when the officers, once having found the thing they seek, can *seize* it without additional prior approval.

Proceeding by analogy, it would be possible to argue that the same rule should apply to entries to make an arrest. Although officers can seize a person and arrest him without an arrest warrant, they arguably should be required to obtain a search warrant in order to enter a private place to search for him.[15] This argument is apparently logical, and it has the virtue of producing symmetry between the law of entry to conduct a search for things to be seized and the law of entry to conduct a search for persons to be seized. But we submit that the argument is not without its flaws. People

[15] See generally Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 Stan. L. Rev. 995 (1971). An arrest warrant may do service for a search warrant, at least for purposes of searching the subject's house.

are more mobile than things, and this difference may call for different rules. History, too, has its claims. For nearly 400 years Anglo-American law has recognized the difference between an entry to search for things and an entry to search for people. We begin with an analysis of this history.

1. *At Common Law In England, And In The United States At The Time The Fourth Amendment Was Adopted, Warrantless Entries To Make Arrests Were The Accepted Practice*

The most authoritative discussion of the common law power of officers to make arrests in private places appears in *Semayne's Case,* 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603). The Kings Bench, while acknowledging that "the house of every one is to him as his * * * castle and fortress, as well for his defence against injury and violence, as for his repose * * *" (5 Co. Rep. at 91b), concluded that his house furnished no refuge when he had committed a felony. It declared that "[i]n all cases when the King * * * is a party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors * * *" (*ibid.*).

In cases in which the official action was reasonable, there was probable cause to arrest, and force was not needed to enter, the rule allowing entry to make warrantless arrests has been followed in England without deviation, so far as we are aware. Indeed,

most courts and commentators adopted the further position that force could be used to make a warrantless arrest so long as the officers gave notice of authority and made demand to enter before breaking in. This seems to have been the general rule. See Sheppard, *The Offices of Constables*, ch. 8, § 2, no. 4 (1650):

> For it is the chief part of their office to represse fellony, and albeit it be a man's house he doth dwell in, which they doe suspect the fellon be in, yet they may enter in there to search; and if the owner of the house, upon request, will not open his dores, it seems that the officer may break open the dores upon him to come in to search.

See also 1 Hale, *Pleas of the Crown* 582–583 (1847). Other commentators were of opinion that, in the absence of fresh pursuit, a warrant should be obtained before breaking doors. See 2 Hawkins, *Pleas of the Crown*, ch. 14, § 7 (1787); Coke, *Fourth Institute of the Laws of England* 177 (1797). No one questioned the rule that if force were not used to enter, no warrant was necessary.

The English courts were concerned not with warrantless entries to make arrests, but with searches and arrests authorized by warrants and supported by less than probable cause. See generally Taylor, *Two Studies in Constitutional Interpretation* 27–43 (1969). In the 18th century the government's policies (and the king himself) came under cirticism that many

EDITOR'S NOTE

Pages 34 + 35 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

House, the *clause appeared as he had proposed it and as the House had rejected it.*

And so it stands today. The records do not show that the alteration was ever noticed or assented to as such by the House. In this form it was received and agreed to by the Senate. And the only remaining discussion by the House and Senate concerned those amendments upon which the two houses were not in accord.

Nothing in this history suggests that the framers desired to upset the settled practice allowing warrantless entries to effect arrests. Indeed, in both England and the United States the practice of making such entries has continued to the present day, and Hale's view, permitting the use of force, appears to have prevailed.[17]

[17] The rule has been so well settled that until recently it has received only the most casual treatment by the commentators. For example, Annotation, 5 A.L.R. 263 (1920), laid it down as a clear rule that "a police officer * * * may make a peaceable or forcible entry to search any premises without a search warrant, for the purpose of arresting one accused of felony * * *. But the person making the search must have reasonable and just cause to believe the person he seeks to arrest is on the premises searched." For other discussions of the American practice, see Taylor, *supra*, at 27–28; Wilgus, *supra*, 22 Mich. L. Rev. at 549; Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 50; *United States* v. *Hall*, 348 F.2d 837, 841 (C.A. 2) (Friendly, J.); *Commonwealth* v. *Carey*, 12 Cush. 246, 251–252 (Mass.). For other statements of the English rule see, *e.g.*, 4 Stephens, *New Commentaries on the Laws of England*, ch. 16, § 3, p. 359 (1845); 4 Blackstone, *Commentaries* 292 (1897); 1 Chitty, *Criminal Law* 15–26, 33, 51–59 (1847); 10 Halsbury's *Laws of England* 354 (3d ed. 1955).

2. This Court Has Acknowledged The Validity of Warrantless Entries To Effect Probable Cause Arrests

Until the last few decades, this Court had not been confronted with a claim that a warrant was required to enter a private place in search of a person whom there was probable cause to arrest. Perhaps the first case presenting the question was *Johnson* v. *United States,* 333 U.S. 10. There officers entered a hotel room and arrested the occupant for drug offenses. The Court held that a warrant was required to enter the room under the circumstances of the case because, since the officers did not know the identity of the individual within, the entry could not be justified as an arrest entry. The Court indicated, however, that if the officers had known the identity of the person to be arrested, they could have entered without a warrant to make an arrest "for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty" (333 U.S. at 15; footnote omitted).

The dictum in *Johnson* was reiterated in *Trupiano* v. *United States,* 334 U.S. 699, 704–705. The officers, who knew that several individuals had built and were operating a still, had more than three weeks to procure search or arrest warrants. Instead of securing warrants, they converged upon the building in which the still was located and arrested one Antoniole, who was found within. The Court indicated that the arrest was proper where the arresting officers observed An-

toniole committing the crime.[18] Cf. *United States* v. *Rabinowitz,* 339 U.S. 56, 60 (warrantless arrest entry proper where officers have probable cause to believe that a felony is being committed in their presence) (dictum).

Then, in *Miller* v. *United States,* 357 U.S. 301, the Court dealt with an arrest similar to the arrest of respondents. A man named Reed had been arrested for a drug offense. He told the police that he had purchased his heroin from Shepherd, who procured his supply from Miller. At 3:00 a.m., a federal agent went to Shepherd's home and paid $100 to Shepherd, who promised to secure heroin from Miller. Shepherd went to Miller's apartment house and emerged with heroin and without the $100. A group of federal agents and local police immediately proceeded to Miller's apartment, broke in, arrested Miller, and recovered the $100. The Court held that evidence seized in Miller's apartment must be suppressed because the officers had not announced their authority and purpose before breaking in; it indicated that, if the proper announcement had been made, the entry, arrest and seizure of evidence would have been proper, 357 U.S. at 302-308.

Ker v. *California,* 374 U.S. 23, held that the standards of conduct applicable to the federal government

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[18] The Court also concluded that it was improper to seize items found in plain view when Antoniole was arrested. This portion of *Trupiano* was overruled by *United States* v. *Rabinowitz*, 339 U.S. 56. *Rabinowitz* was in turn overruled by *Chimel* v. *California*, 395 U.S. 752, to the extent *Rabinowitz* allowed a seizure of items not found in plain view or within the immediate control of the person arrested. Neither *Rabinowitz* nor *Chimel* affected the discussion in *Trupiano* relating to the validity of the arrest of Antoniole.

under the Fourth Amendment also apply to the States under the Fourteenth Amendment. The official conduct involved in *Ker* was a warrantless entry into an apartment for the purpose of making a warrantless arrest. The Court upheld the warrantless entry. Even the dissenters contended only that the officers had not adequately announced their authority and purposes before breaking into the apartment. See *id.* at 47–49 (Brennan, J., dissenting in part). No Justice questioned the rule that a warrantless forcible entry properly can follow such an announcement, and four Justices expressly adopted that rule.

Finally, in *Sabbath* v. *United States*, 391 U.S. 585, the Court again indicated that an entry to make an arrest on probable cause is reasonable within the meaning of the Fourth Amendment if preceded by the proper announcement and demand. It wrote: "This Court has held * * * that the validity of an entry of a federal officer to effect an arrest without a warrant 'must be tested by criteria identical with those embodied in' [18 U.S.C. 3109]" (391 U.S. at 588, footnote omitted, quoting from *Miller, supra*, 357 U.S. at 306). Section 3109 authorizes forcible entry after notice of authority and demand to enter. Although the Court held that an unannounced entry through an unlocked but closed door did not meet the criteria of Section 3109, the proposition that the arrest entry would have been upheld if the requirement of announcement had been observed is implicit in its decision.

Although none of these cases expressly hold that warrantless arrest entries are presumptively reason-

able within the meaning of the Fourth Amendment, all of them appear to accept the common law rule as so much a part of our jurisprudence that it could be acknowledged without the need for a formal holding. At the time the Court was writing these decisions, every State that had occasion to consider the matter had provided for warrantless arrest entries; the validity of such police action was clearly a part of the fabric of our law.[19] There was little need to endorse

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[19] ALI *A Model Code of Pre-Arraignment Procedure* 240–241 (Official Draft 1972), collects the statutes in 37 States establishing the right to make entries to effect arrests without warrants. Other States have approved the practice by judicial decision. See *People* v. *Eddington*, 23 Mich. App. 210, affirmed, 387 Mich. 551, 198 N.W. 2d 297; *Wanzer* v. *State*, 202 Md. 601, 97 A.2d 914; *State* v. *Doyle*, 42 N.J. 334, 200 A.2d 606. In Pennsylvania the power to make warrantless arrests is granted by Pa. R. Crim. P. 101 and 130. See also *Commonwealth* v. *Bosurgi*, 411 Pa. 56, 66; *Commonwealth* v. *Rush*, 326 A.2d 340 (Pa. Sup. Ct.); *Commonwealth* v. *Hughes*, *supra*. Congress is in agreement. See D.C. Code § 23–591 (1973).

The state statutes also reflect the division in the common law cases regarding the permissibility of using force to effect an arrest entry. Thirty of the 37 statutes allow forcible warrantless entries to make felony arrests, while the remaining seven statutes require a warrant to break open doors. Several of the statutes allowing warrantless entries have been amended or carried forward after the date of the ALI's compilation, but none of the States has changed its position. See Alaska Statutes § 12.25.100 (1973); Colorado Revised Statutes, tit. 16, § 3–101(3) (1974); West's Florida Statutes Annotated § 901.19(1) (1973); Kansas Statutes Annotated § 22–2405 (1974); Michigan Statutes Annotated § 28.880 (1972); Mississippi Code Annotated § 99–3–11 (1973); Nebraska Revised Statutes § 29.411 (Cum. Supp. 1974); Nevada Revised Statutes § 171.138 (1973); North Carolina General Statutes § 15–43 (1975); North Dakota Century Code Annotated § 29–06–14 (1974); Ohio Revised Code Annotated § 2935.12 (Anderson 1975); Oregon Revised Statutes § 133.320 (1973–1974).

the rule because defendants in criminal cases did not challenge it.

We know of no cases in this Court supporting a contrary position, although doubts have been expressed. In *Jones* v. *United States,* 357 U.S. 493, 499–500, the Court's holding enabled it to avoid "a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment." (The entry in the instant case did not occur at night, nor was it forceful.) Four justices expressed doubts in *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 476–481, reasoning that "[i]t is clear * * * that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances' " (403 U.S. at 477–478). The plurality in *Coolidge* found it unnecessary to resolve this conflict. And so the rule stands today.[20]

[20] The plurality in *Coolidge* believed that "[t]he case of *Warden* v. *Hayden*, *supra*, where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the

3. There Is No Persuasive Reason to Set Aside 400 Years of Practice and Establish a Presumptive Rule That a Warrant Is Necessary to Enter a Private Place to Make an Arrest on Probable Cause

The common law practice of making warrantless entries to effect felony arrests has been followed in most States.[21] Until recently it also had been approved by the lower federal courts. However, in 1970 the District of Columbia Circuit adopted a rule, subject to broadly-defined exceptions, that warrants ordinarily are required to make arrest entries (*Dorman* v. *United States*, 435 F. 2d 385 (*en banc*)).[22] The *Dorman* approach has been adopted by the Fourth, Sixth, Eighth, and Ninth Circuits, and by the highest courts of three States.[23] Other courts of appeals have con-

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absence of exigent circumstances." 403 U.S. at 480–481. We respectfully disagree with this analysis. *Hayden* used the "hot pursuit" justification both to justify the entry to make an arrest and to justify the thorough search of the house in which the suspect was hiding. The officers searched, for example, the contents of a washing machine. Whether or not the officers were at liberty to enter to make the arrest, the "hot pursuit" justification would have been necessary to support the extensive search. Moreover, we do not believe that a practice so long used in Anglo-American law can be rejected by "negative implication." Nor has the Court interpreted *Hayden* in the fashion suggested by the plurality in *Coolidge*. See *Sabbath*, *supra*.

[21] See note 19, *supra*.

[22] *Dorman* overruled *Washington* v. *United States*, 263 F. 2d 742 (C.A.D.C.) (Burger, J.), which had approved warrantless arrest entries.

[23] *Vance* v. *North Carolina*, 432 F. 2d 984 (C.A. 4); *United States* v. *Shye*, 492 F. 2d 886, 891 (C.A. 6); *Salvador* v. *United States*, 505 F. 2d 1348 (C.A. 8); *United States* v. *Phillips*, 497 F. 2d 1131 (C.A. 9); *Commonwealth* v. *Forde*, 329 N.E. 2d 717 (Mass.); *Stuck* v. *State*, 255 Ind. 350, 264 N.E. 2d 611; *Nilson* v. *State*, 272 Md. 179, 185–191, 321 A. 2d 301, 304–308.

tinued to follow the common law practice.[24] Still others have not had an opportunity to speak on this subject since *Dorman*.

We submit that the Court should not now set aside a practice long followed in England and this country. While we do not suggest that history ought to blind this Court to the interests involved in warrantless arrest entries, "recognition of that reality does not liberate us from all historical restraint." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 256 (Powell, J., concurring). When courts and legislatures have for centuries followed a settled practice, this Court is perforce constrained not to consider the validity of the practice as though it were a matter of first impression.

We do not rely, however, upon history and *stare decisis* alone for support. The American Law Institute recently completed its study of pre-arraignment procedures and has concluded that officers should continue to be empowered to make warrantless arrest entries. ALI, *A Model Code of Pre-Arraignment Procedure* § 120.6(1) (Official Draft 1972). The *Model Code* would change the traditional rule only to the extent of establishing a presumptive need for a warrant to

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[24] See *United States* v. *Fernandez*, 480 F. 2d 726, 740, n. 20 (C.A. 2) (Friendly, J.); *United States* v. *Wysocki*, 457 F. 2d 1155, 1159 (C.A. 5) ("In our judgment not only did the officers, *as prudent men*, have probable cause to arrest Wysocki, they would have been negligent and derelict in the performance of their duties if they had failed to arrest him"); *United States ex rel. Wright* v. *Woods*, 432 F. 2d 1143 (C.A. 7). The position of the Third Circuit is less than clear. See *Fisher* v. *Volz*, 496 F. 2d 333; *United States* v. *Miles*, 468 F. 2d 482; *United States* v. *Davis*, 461 F. 2d 1026.

make an arrest in the nighttime; even then, no warrant would be necessary if the officer making the arrest reasonably believed that a prompt arrest would be necessary to prevent escape, harm to bystanders, or destruction of evidence (*id.* at § 120.6(3)(b)). The commentary explains that the requirement of probable cause for a daytime arrest provides ample protection to the legitimate interests of the individual. "To go further and require a warrant or a showing of necessity before police may make a felony arrest on private property even in daytime seems unduly restrictive" (*id.* at 146).

The distinction drawn by the American Law Institute is a reasonable one.[25] People are different from things because people are more active than things. To require a warrant as a matter of course before the police can enter a house to make an arrest would in many cases offer the suspect unacceptably large opportunities to escape or destroy evidence. Law enforcement officers might be able to avert escapes by placing suspects under "house arrest" while a warrant is being sought, but that course, too, has its dangers. Upon learning of his "house arrest," the suspect could destroy any evidence within the house. He also could arm himself and endanger the lives of the officers when they eventually attempt to make the arrest.[26]

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[25] See also ALI, *Code of Criminal Procedure* § 28 (1930); ALI, *Restatement (Second) of Torts* § 206 (1965), which adopt the common law rules.

[26] In most cases it is not possible for officers to ascertain in advance whether suspects are armed. In the instant case respondents

Moreover, entries to make arrests are, as a class, less intrusive than entries to search for things. Ordinarily, when officers arrive at a house for the purpose of arresting a particular individual, that individual will come to the door and accede to the officers' demand, and no entry into the premises will be required. A search, on the other hand, will ordinarily require intrusion into the premises.[27] And even if the individual whom the officers seek to arrest attempts to hide, the scope of the search for his person will be far less intrusive than the typical search, since it will involve no rummaging through private papers, drawers and cupboards, medicine cabinets, or the like.

The burden of our argument is that the Fourth Amendment requires only that official actions be reasonable, and that arrest entries, as a class, should be deemed presumptively reasonable if the officers have good grounds to believe that a person whom they have probable cause to arrest for a felony is within. True, the Court has held that an entry into a house to search for a chattel is unreasonable unless authorized by a warrant, justified by exigent circumstances, or authorized by the consent of the occupant. But reasonable-

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were not armed when they were apprehended. But the officers did not know this. And respondents might have had weapons in the house that they could have used if they had been put on notice of the impending arrest.

[27] It is true that, in at least some instances, a search of the house could be avoided if the occupants produce the object sought. But usually, as in a search for drugs, stolen goods, gambling records, or the like, the police will need to search anyway to ensure that all of the material sought has been secured.

ness, not the presence or absence of a warrant, is the test in the last analysis. As this Court has pointed out in analogous contexts, the question is not whether it would have been reasonable to get a warrant, but whether the official action was reasonable. *Cooper* v. *California*, 386 U.S. 58, 62; *United States* v. *Edwards*, 415 U.S. 800, 807. Cf. *Wyman* v. *James*, 400 U.S. 309, 318.

In summary, we submit that there are important differences between the considerations pertaining to the seizure of chattels and those pertaining to the seizure of people. Because of these differences—practical as well as historical—it is ordinarily reasonable for law enforcement officers to enter a house without a warrant to make an arrest. As Mr. Justice White has suggested in his dissent in *Coolidge* (403 U.S. at 512, n. 1), the time and mode of entry in a particular case may be unreasonable, and, if so, the arrest would be improper. But the possibility that some arrest entries will be unreasonable is not a sufficient justification for requiring warrants prior to all arrest entries.

C. ANY REQUIREMENT OF WARRANTS TO MAKE ARREST ENTRIES SHOULD BE LIMITED TO NIGHTTIME OR DELAYED ARRESTS

If, as the Court suggested in *Jones* and the plurality suggested in *Coolidge*, warrants sometimes should be obtained before entering a house to search for someone whom there is probable cause to arrest, the Court could formulate two different sorts of rule to achieve that result.

The first sort of rule, which we believe would be the more sound approach, would state that warrants are necessary in carefully defined situations. *Jones* expressed concern about forcible nighttime entries; a rule responding to this concern would require warrants for such entries, which by their nature are more intrusive than daytime entries. This rule would be similar to the rule suggested by the American Law Institute. (Indeed, it might well be regarded as unreasonable to make a nighttime entry, warrant or no warrant, when a daytime entry would have served as well.) Similarly, because entries to make arrests for crimes long completed are more likely to be mistaken, and are more open to abuse, than are entries to arrest individuals for freshly committed or ongoing crimes, the Court might hold that warrants ordinarily should be obtained to make arrests for crimes completed more than a few hours prior to the arrest. See our argument at pages 25–29, *supra*. The rules requiring warrants in such cases would, of course, be subject to the traditional exceptions for exigent circumstances or consent.

The second sort of rule would provide that a warrant is ordinarily required to make *any* arrest entry. This is the position taken by *Dorman*, which qualified the presumption in favor of a warrant with a lengthy list of circumstances that might justify warrantless entries. *Dorman, supra*, 435 F. 2d at 392–393.

If the Court holds that some arrest entries are unreasonable in the absence of a warrant, we submit that it should formulate a rule of the first sort in preference to the *Dorman* approach. Such a rule would give specific guidance to the officer contemplating the possibility of an arrest. The *Dorman* formulation, which requires numerous exceptions and "balancing" factors, offers no similar guidance. The *Dorman* court listed seven factors that police should consider when determining whether to make a warrantless arrest entry (*ibid.*). A list twice that length could easily be proposed.[28] But it is difficult to understand how the officer

[28] We can think of at least 15 relevant factors: (1) advance opportunity to obtain a warrant; (2) the nature of the premises entered (dwelling versus barn, for example); (3) likelihood of intruding upon the privacy of third parties; (4) whether the offense is ongoing or has been completed; (5) risk of escape or flight; (6) whether an informant or agent is already on the premises; (7) the gravity of the crime for which the arrest will be made, especially whether the crime involved violence; (8) whether the suspect is likely to endanger the officers when captured; (9) whether the suspect is likely to endanger third parties if allowed temporarily to remain at large; (10) the existence of an ulterior motive to search the premises on which the arrest will be made (this might be evidenced, for example, by the officers' failure to avail themselves of an earlier opportunity to make the arrest in a public place); (11) time of the arrest; (12) whether the entry is forcible; (13) how strong is the probability that the suspect is within the premises to be entered; (14) how long it would take to obtain a warrant if the attempt were made to do so; (15) whether the suspect is arrested in his own home (where he may be presumed to be) or elsewhere (where he is less likely to be).

can be expected to recall and balance numerous factors on the spur of the moment. What should he do if most factors indicate immediate arrest, and a few factors militate in favor of a delay to obtain a warrant? Such decisions are difficult to make even in hindsight with time for quiet contemplation. They would be impossible to make in the rush of events that often precede a decision to arrest. We submit that here, as was the case with fresh pursuit, it is advantageous to formulate a rule that holds to a minimum the inevitable areas of gray in which "reasonableness" must be assessed case-by-case.[29]

A rule permitting warrantless arrest entries in most cases, while ordinarily requiring a warrant under clearly defined circumstances (for example, at night), would achieve the degree of certainty necessary to notify officers of what is expected of them and to make the exclusionary rule an effective deterrent to misconduct.

D. EVEN IF THE COURT ADOPTS A PRESUMPTIVE RULE IN FAVOR OF WARRANTS, THE ARREST OF SANTANA WOULD COME WITHIN THE EXCEPTIONS TO THAT RULE

If the Court not only rejects the common law practice of warrantless arrest entries but also adopts the *Dorman* approach, it will then have to decide whether a warrant was required in this case. We have argued at pages 23–29, *supra*, that even if warrants ordinarily are required for arrest entries, there should be exceptions for arrest entries in the hours immediately after the crime and for entries in which the officers

[29] See pages 25–29, *supra*.